DOCUMENT RESUME

ED 236 707 CS 504 302

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TITLE Exemption 6: Privacy under the Freedom of Information Act.
INSTITUTION Freedom of Information Center, Columbia, Mo.
REPORT NO FOI-476
PUB DATE Jun 83
NOTE 9p.
AVAILABLE FROM Freedom of Information Center, Box 858, Columbia, MO 65205 ($1.00, quantity discounts available).
PUB TYPE Information Analyses (070)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Confidentiality; *Court Litigation; *Disclosure; *Federal Legislation; Freedom of Speech; Information Dissemination; Information Sources; Newspapers; *News Reporting; Privacy
IDENTIFIERS Department of State; *Freedom of Information Act; Washington Post

ABSTRACT

In 1979, "The Washington Post" brought suit against the State Department to compel the release of certain passport information under the Freedom of Information Act (FOIA). The State Department had refused release under the "similar files" clause of the Act's Exemption 6, stating that release would be an invasion of privacy. In trying to develop a workable standard for applying this ambiguous phrase, courts have applied a series of tests to determine what kind of information can be released without invading individual privacy: if a record were not a personnel or medical file or one that could be designated "similar file," it generally could be released without further consideration. The "Post" maintained that "similar files" pertained only to files that, like personnel and medical files, contained intimate details about a person's life. The State Department argued that passport documents were "similar files" because they contained identifiable facts about the specific individuals, the release of which would expose them to danger. In 1982, the Supreme Court ruled in favor of the State Department, stating that passport files contained much of the same information exempting a medical or personnel file. The Court decided that Congress had intended to include "intimate" or "personal" records under the rubric of "similar files." (HTH)

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JUNE, 1983

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# EXEMPTION 6: PRIVACY UNDER THE FREEDOM OF INFORMATION ACT

## FREEDOM OF INFORMATION CENTER REPORT NO. 476

**This report was written by Jeanne Abbott, an instructor and Ph.D. candidate at the University of Missouri School of Journalism.**

During the heat of the 1979 political crisis in Iran, the Washington **Post** turned over the corner of a story that could have unfolded into a significant commentary on the Iranian government's avowed anti-American position. A correspondent for the **Post** learned that two prominent figures in Iran's revolutionary government reportedly were American citizens with valid U.S. passports. At the time, both men were living in Iran.

The **Post** printed a story quoting an Immigration and Naturalization Service source who said that Dr. Ibrahim Yazdi, Iran's foreign minister in the Khomeini government, had become a naturalized U.S. citizen in 1971 and never had renounced his Iranian citizenship. The second revolutionary leader was Dr. Ali Behzadnia. Sketchy information produced later indicated one had lived in Houston, the other in Michigan.

In September 1979, the **Post** filed a Freedom of Information Act request with the U.S. Department of State. The newspaper asked for documents showing whether Yazdi or Behzadnia were U.S. citizens or had obtained U.S. passports.

The following month, the State Department declined to disclose the information, citing 5 U.S.C. 552 (b)(6) and claiming that disclosure would be a "clearly unwarranted invasion of the privacy of (these) persons."[1] Therefore, the department argued, the release of any citizenship records was exempt from disclosure under Exemption 6 of the FOIA.

Exemption 6 provides that the act's disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[2]

The department argued that release of the requested records could result in harm to both Iranian leaders. Because of the rampant anti-American sentiment in that country, the department contended, Iranian officials suspected of American connections would be mistrusted and in danger of violent harm from nationalistic Iranian groups.

The resistance to the release of citizenship information was confirmed at a higher level when the department's Council on Classification Policy concluded that the privacy interests at stake were not incidental, that they outweighed any public interest to be served by release of the information.

In late 1979, the **Post** brought suit in the U.S. District Court for the District of Columbia to compel release of the records. During the next two years, the case was heard in district court and the U.S. Court of Appeals for the District of Columbia Circuit before the U.S. Supreme Court granted review.

The high court handed down its decision May 17, 1982, in **U.S. Department of State v. Washington Post Co.**, 456 U.S. 595, 102 S. Ct. 1957 (1982). The ruling is the latest, most direct and most authoritative judicial statement on privacy under the Freedom of Information Act.

### THE AMBIGUITY OF EXEMPTION 6

The very nature of Exemption 6 has made it difficult to establish hard and fast rules about the type of individual privacy that deserves to be protected. The meaning of the exemption has been the subject of considerable litigation and scholarly comment since the FOIA was enacted in 1966.

The problem has not been with the language concerning personnel and medical files — which has been relatively easy to interpret — but with the unhelpful, general term "similar files."

**Summary**

Under a 1982 Supreme Court decision, federal files identifying a particular individual fall under the privacy exemption to the FOIA. The author surveys the issues and major court cases dealing with that exemption and concludes with the response to, and implications of, the 1982 decision.

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> The use of this broad term 'similar' by the drafters eliminated the need to decide application to each of an exhaustive list of files in the possession of the federal government. Unfortunately, although the term simplified matters for the legislature, the inherent problems in its interpretation have confused the courts. The legislative history of the privacy exemption has not provided an adequate background for determining which agency information qualifies as 'similar.' Consequently, the holdings of cases involving 'similar files' are inconsistent.[3]

In other words, was "similar files" a catchall phrase devised by Congress because it was impossible to list all the kinds of records the exemption was intended to cover? Or was it an additional limitation on disclosure, to be applied to non-personnel and non-medical records if certain (but unspecified) privacy interests would be invaded?

This built-in ambiguity has forced the courts to make fine-line distinctions about the types of privacy that would be compromised if records were released. After passage of the FOIA, the courts were left to variously interpret the exemption — to determine whether such records as names and addresses of union members, financial documents, criminal histories, housing applications and church affiliation fell within the rubric of "similar files."

In trying to develop a workable standard, courts have applied a series of tests to determine what kind of information can be supplied without invading individual privacy. The first test is whether the requested record either is a personnel or medical file or one that could be designated a "similar file." If the record failed that test, it generally could be released without further consideration.

If the record did fall within one of the three categories above, the court then had to decide whether disclosure of the information would constitute a "clearly unwarranted invasion of privacy." That required weighing the severity of the invasion against the public's interest in disclosure — a judgment call known as the "balancing test."

Often, a court also inquires whether there are alternative methods of obtaining the requested information.

Historically, none of the tests appear to have proven as legally troublesome as deciding what is a "similar file." In a 1980 article for the **Journal of Legal Studies**, Yale Law professor Anthony T. Kronman suggested that courts have followed two general patterns when considering the matter of "similar files." Kronman said courts have looked to see if records should be withheld as "similar files" because they contain embarrassing facts about individuals:

> Several cases state that disclosure of an embarrassing fact about an individual, a fact that will lead others to be less favorably disposed toward him, constitutes an invasion of his personal privacy and therefore falls within the ambit of the FOIA's sixth exemption.[4]

Courts also use the "similar files" language as a reason to protect people from unrequested solicitations, writes Kronman.

> (N)o matter how slight the intrusion, a person's privacy is invaded (at least so the cases seem to suggest) whenever someone else forces himself or his ideas upon a person without an invitation.[5]

An analysis of case law reveals that the notion of "embarrassing facts" indeed was developed in a series of important court decisions in the District of Columbia Circuit Court. As the courts struggled to properly apply the protection intended by Exemption 6, a consensus was reached that "similar files" applied to records containing information of a "highly personal" or "intimate" nature.

Decisions to release records were based on whether they would divulge information less intimate or personal than the private matters contained in personnel or medical files. See **Getman v. National Labor Relations Board**, 450 F.2d 670 (D.C. Cir. 1971); **Rural Housing Alliance v. Department of Agriculture**, 498 F.2d 73 (D.C. Cir. 1974); **Board of Trade, Etc. v. Commodity Futures Trading Commission**, 627 F.2d 392 (D.C. Cir. 1980); and **Simpson v. Vance**, 648 F.2d 10 (D.C. Cir. 1980). See also **Kurzon v. Department of Health and Human Services**, 649 F.2d 65 (1st Cir. 1981).

The judicial consensus initially was reached in **Getman**. There the court reviewed the legislative history of the Freedom of Information Act — H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), and S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). After reviewing that history, the court decided:

> Both the House and Senate reports on the bill which became the Freedom of Information Act indicate that the real thrust of Exemption (6) is to guard against unnecessary disclosure of files of such agencies as the Veterans Admnistration of the Welfare Department or Selective Service or Bureau of Prisons which would contain 'intimate details' of a 'highly personal nature.'[6]

This approach became the basis for later decisons in **Rural Housing Allinance**, **Board of Trade**, **Simpson** and **Kurzon**, among others.

Each Exemption 6 controversy required the courts to make case-by-case judgments about the degree of intimate information that would be revealed through disclosure and the amount of privacy that would be lost should the records be released — to engage in the balancing test. How intimate are names and addresses of government employees? How personal is information about marital status? Financial history? Employment background? Legitimacy of children? If such records were only minimally intimate or personal, the loss of privacy would be relatively slight and the records could be released under the FOIA. If the records were highly intimate or personal, Exemption 6 could be invoked and the documents withheld.

It was against this backdrop that the Washinton **Post** sought release of passport information about the Iranian leaders.

## LOWER COURT REVIEW

In its suit, the **Post** maintained that "similar files" pertained only to files that, like personnel and medical files, contained intimate details about a person's life. Their argument turned on the idea of "intimate details," which the D.C. Circuit Court already had adopted as the standard for Exemption 6 cases.

The "intimate details" standard was not an issue in the government's approach to the **Post** lawsuit, however. Instead, the State Department argued that passport documents were "similar files" because they contained identifiable facts about specific individuals, the release of which would expose them to danger. The department filed affidavits in support of withholding the records, including one from Harold H. Saunders, assistant secretary of state for Near Eastern and South Asian affairs, which said in part:

> It is the position of the Department of State that any statement at this time by the United State's government which could be construed or minsconstrued to indicate that any Iranian official is currently a United States citizen is likely to cause a real threat of physical harm to that person.[7]

The **Post** won the first round, the District Court granting the newspaper's motion for summary judgment. The State Department filed an appeal in the U.S. Court of Appeals for the District of Columbia Circuit. That court also ruled in favor of the **Post**.

Quoting **Simpson v. Vance**, in turn quoting **Board of Trade**, the appellate court held that the phrase "similar files" applied only to records which contain information "of the same magnitude — as highly personal or as intimate in nature — as that at stake in personnel and medical records."[8]

The appeals court found the citizenship status of Behzadnia and Yazdi to be less intimate in nature than information normally contained in personnel and medical files. Therefore, the court reasoned, there was no need to engage in the balancing test — to consider whether disclosure of the information sought would constitute a clearly unwarranted invasion of their personal privacy.

The State Department had failed to meet the first test of Exemption 6 cases. The information had to be disclosed under the FOIA. But the department appealed to the Supreme Court, which agreed to review the lower court's interpretation of the "similar files" provision.

## U.S. DEPARTMENT OF STATE v. WASHINGTON POST CO.

Two years before the Supreme Court heard oral arguments in the **Post** case, a law review article, "How Similar is a Similar File?" by Barbara A. Joseph (2 **W. New Eng. L. Rev.** 815, Spring 1980), called for congressional review of the privacy exemption to remedy the confusion about "similar files" and to give courts a clearer understanding of legislative intent in drafting that section.

> Congressional review is clearly preferable to the continued confusion over, and the redefinition of, the privacy exemption, which causes courts to create their own standards. The courts, the administrative agencies, and the citizens for whom the FOIA was drafted will benefit from reevaluation of the balance between privacy and the public's access to government documents.[9]

Because Congress used general language apparently to avoid an arbitrary list of exempt records, the "similar files" phrase had caused confusion about what government records should be kept private. Thus, when the Supreme Court granted review of the **Post** case, it had the opportunity to clarify the language in Exemption 6, review the particular interpretation given the exemption by the D.C. Circuit Court and provide lower courts with the highest legal authority when deciding future Exemption 6 cases.

In its unanimous decision, the high court rejected the appelate court's interpretation of the "similar files" test. The lower court's standard was narrower than Congress had intended, the Supreme Court said. The concrete result was to permit the State Department to withhold release of the passport records because they fell within the category of "similar files" under Exemption 6.

In addition to the direct impact of the ruling, the high court concluded that Congress had intended to include "great quantities of files" within the scope of Exemption 6. Writing for the court, Justice William H. Rehnquist said a review of the legislative history of the exemption showed that Congress meant it to be a "general" restriction on the release of personal files, rather than a "narrow addition" to personnel and medical files.

Although the Supreme Court remanded the case back to the U.S. District Court in Washington D.C. for consideration of the ancillary claim that release of the records would invade the Iranians' privacy, the decision already was being regarded in media circles as a judicial statement in favor of greater government secrecy.

The U.S. Department of Justice, on the other hand, viewed the decision as a victory for the right of privacy. In effect, the high court said that "personnel and medical files and similar files" could mean any personal records whatsoever, an argument the government had pressed consistently in the case. The Supreme Court agreed with the government that the exemption was meant to cover those government records on an individual which can be identified as applying to that particular individual.

In oral arguments before the high court, Washington **Post** attorney David Kendall had objected to the government's position that any document naming an individual should be considered a "similar file." Kendall said the government's interpretation "would be so expansive. . . that it would distort the shape of the Freedom of Information Act in a very significant fashion."[10]

Kendall argued the passport documents were created dur-

ing the process of naturalization, a public process with no expectation of privacy. He noted that information concerning the citizenship status of one of the Iranians already had been published in two books. The **Post** turned to an FOIA request, he said, because reporters did not know which naturalization court had dealt with the Iranian officials.

Government attorney Kenneth Geller countered that lower courts had erred by not judging citizenship records to be "personnel, medical or similar files." If they met that criteria, the balancing test then would be applied to determine whether their disclosure would constitute a clearly unwarranted invasion of privacy. Instead, Geller argued, the common denominator of "similar files" was not their "intimate details," — as the appelate court had ruled — but rather the presence of identifiable facts about individuals.

The Supreme Court agreed with Geller. In his opinion, Rehnquist wrote:

> (The Washington **Post**) relies upon passing references in the legislative history to argue that the phrase 'similar files' does not include all files which contain information about particular individuals, but instead is limited to files containing 'intimate details' and 'highly personal' information. . . . We disagree. Passing references and isolated phrases are not controlling when analyzing a legislative history. Congress' statements that it was creating a 'general exemption' for information contained 'in great quantities of files' (H.R. Rep. No. 1497). . . suggest that the phrase 'similar files' was to have a broad, rather than a narrow meaning. . . . Had the words 'similar files' been intended to be only a narrow addition to 'personnel and medical files' there would seem to be no reason for concern about the exemption being 'held within bounds' (by the clearly unwarranted invasion of privacy) and there surely would be clear suggestions in the legislative history that such a narrow meaning was intended. We have found none.[11]

Rehnquist said the passport records were likely to contain the same kind of non-intimate information as would be found in personnel and medical files — place of birth, date of birth, date of marriage, employment history and other data normally not regarded as highly personal. Yet such information personnel and medical records would be exempt from disclosure. "It strains the normal meaning of the word to say that such files are not 'similar' to personnel or medical files," he wrote.[12] In conclusion, Rehnquist wrote,

> (T)he exemption (was) intended to cover detailed Government records on an individual which can be identified as applying to that individual. . . . When disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of a person's privacy.[13]

The Supreme Court thus altered the D.C. Circuit Court's accepted standard for Exemption 6 cases to permit detailed information directly related to an individual to fall within the rubric of "similar files." With that accomplished, the second test then would be applied — the balancing of the public interest in disclosure against the private interest of withholding the records.

## SIMILAR FILES: THE CONFLICT

The high court's decision immediately was applauded by the Justice Department and criticized by members of the press.

Prior to the ruling, the department, through its Office of Information and Privacy (formerly Office of Information Law and Policy), consistently had opposed the D.C. Circuit Court's interpretation of "similar files." In late 1981, the office said in a policy statement:

> This departure could severely weaken federal agencies' ability to protect personal information in their files. . . . O-LIP believes the D.C. Circuit's new line of decisions is erroneous as a matter of law and highly undesirable as a matter of policy.[14]

Following the high court's ruling, the office expressed a note of vindication in a 1982 policy discussion:

> . . . the Supreme Court has revitalized the commonsense, practical approach of giving privacy considerations their full weight in the delicate balancing process by which agencies must determine whether the disclosure of personal information under the FOIA is warranted. In the wake of **Washington Post**, agencies can now ensure that needed protection is accorded to any information which applies to a particular individual.[15]

At the opposite end of the opinion scale was the reaction of the press, exemplified by a June 2, 1982, editorial in the Los Angeles **Times**. The editorial suggested that, within press circles at least, there was a sense that the court's decison had erected yet another barrier to the acquisition of government records:

> (Rehnquist) concluded that information about an individual should not lose the protection of an exemption because it is stored in records other than those labeled 'personnel' or 'medical.' That would be true, we believe, if the information rationally could be described as 'personal,' but the high court's interpretation of the term broadened it beyond recognition.[16]

According to the **Times** editorial, the court's ruling indicated a "bias against the spirit of the Freedom of Information Act. There is also a bias built into the act. It is a bias against secrecy in government."[17]

Jack Landau, director of the Reporters Committee for Freedom of the Press, called the decision a "mammoth defeat" for defenders of the FOIA. "By saying that matters on public records in courthouses can be kept secret as a matter of 'personal privacy,' the court will encourage the government to wave privacy around any time the public and press make requests for information which might prove embarrassing to government officials."[18]

Tonda Rush, director of the FOI Service Center in Washington D.C., said in a telephone interview that while there are clear instances where privacy should be protected, "the privacy protection in the FOIA, originally intended by Congress to cover those files intimate in nature, has been expanded to the point where any information about an individual in a government file potentially can trigger a privacy consideration. . . . Congress did mean to protect private citizens from gross invasions of privacy. Congress did not mean to expand privacy to cover virtually every mention of an individual in government files."[19]

And while David Kendall, the **Post**'s attorney, asserts the high court did not fully embrace the government's position, officials in the Justice Department have a different opinion. Daniel J. Metcalfe, co-director of the department's Office of Information and Privacy, said he is certain that construing "similar files" to mean only those records intimate and highly personal in nature is now a defunct standard. "The D.C. Circuit's construction has no vitality," he said in a telephone interview. "Of that I have not the slightest doubt. . . . The Supreme Court in **Washington Post** has completely vindicated the government's position that the D.C. Circuit's rigid 'similar files test' for determining the applicability of Exemption 6 was unduly narrow."[20]

While Kendall argues the **Post** decision was based on "idiosyncratic and distinct facts," Metcalfe says the decision has broad application. "The **Post** decision simply eradicates what had been an artificial barrier to proper Exemption 6 protection in the first place. It simply permits agencies to undertake the balancing required by Exemption 6 in all cases," Metcalfe said.[21]

## D.C. CIRCUIT DECISIONS RECONSIDERED

The Exemption 6 standard rejected by the Supreme Court in the **Post** case initially had been developed in **Getman v. National Labor Relations Board**. That case involved the issue of access to "excelsior lists" — names and addresses of employees elgibile to vote in certain union elections. In **Getman**, the D.C. Circuit Court stated that the purpose of Exemption 6 was to protect records "which would contain intimate details of a highly personal nature." But the court took that stance in the context of deciding whether release would constitute a clearly unwarranted invasion of personal privacy. The court assumed the records were "similar files," but ordered their release because it found no clearly unwarranted invasion of privacy.[22]

Three years later, in **Rural Housing Alliance v. Department of Agriculture**, the D.C. Circuit Court again expressed its view that Exemption 6 was designed to "protect individuals from public disclosure of intimate details of their lives."[23] In that case, the advocacy group Rural Housing Alliance had sought housing investigation reports to aid its study of racial discrimination in Florida housing projects. The court ruled that the records — which contained information about individuals' marital status, legitimacy of children, medical conditions, alcoholic conditions and family fights — were "sufficiently intimate details" to justify withholding from disclosure.

In **Board of Trade, Etc. v. Commodity Futures Trading Commission**, the court held the identification of industry sources critical of portions of a plywood futures contract did not rise to the level of highly personal or intimate information. "Certainly no fact of an intimate nature is likely to be revealed by providing the Board of Trade with access to names of those who censured the shipping provisions or proposed alternatives."[24] The court ruled the documents were not "similar files" and thus did not advance to the balancing test.

In **Simpson v. Vance**, diplomacy historians wanted to see copies of the State Department's **Biographic Register**, which had been open to the public for nearly 100 years before it was sealed in 1974. It contained a summary of senior and mid-level department employees.

Citing **Board of Trade** and **Rural Housing Alliance**, the D.C. Circuit Court concluded that most of the information in the **Register** — including date of birth, place of birth, marital status, employment background and work experience — could not be withheld on the basis of Exemption 6:

> Although there is no dispute that the information which the Department is withholding relates to the employees' private lives, and therefore some privacy interest is present, that interest is not of the 'magnitude' such as that warranting protection in personnel and medical files.[25]

## OTHER EXEMPTION 6 CASES

In **Kurzon v. Department of Health and Human Services**, an action was brought to compel disclosure of names and addresses of unsuccessful applicants for research grants from the National Cancer Institute. A court found the information "not sufficiently personal or private to satisfy the 'similar files' requirement."[26]

In an earlier case, the U.S. Supreme Court ruled on an Exemption 6 case but did not reach a definitive holding about what constituted a "similar file." In **Department of the Air Force v. Rose**, 425 U.S. 352 (1976), New York University Law Review researchers had requested case summaries of the Honors and Ethics codes at the Air Force Academy. The high court found the summaries to be "similar files" in two ways:

> First, they relate to the discipline of the cadet personnel. . . . Second and most significantly, the disclosure of these summaries implicates similar privacy values. . . .[27]

Nevertheless, the court released the records after requiring that a judge inspect the summaries **in camera** to determine whether individual rights to privacy would be breached by disclosure. However, the high court provided no pervasive definition of "similar files" in the case. The summaries were released after cadets' names were deleted.

There are lower court decisions, however, that are instructive on the question of "similar files," even under the **Post** ruling. The cases discussed here do not conflict with **Post** because the records requested were categorized as "similar files" whose dislcosure constituted clearly unwarranted invasions of privacy. These cases shed light on restrictions to access that already were in place before **Post**. They also illustrate the scope of records being sought and denied under Exemption 6 requests.

**Religious affiliation** — In **Church of Scientology, Etc. v. Department of the Army**, 611 F.2d 738 (9th Cir. 1979) the religious association sought documents held by the Defense and Army Departments pertaining to Scientology founder L. Ron Hubbard. The appeals court, finding that portions of the documents identified individuals associated with the church and the various positions they held in the church, said:

> On balance we cannot say that the court erred in upholding the government's decision of information pertaining to Church personnel. A reasonable person would be very likely to find that disclosure of religious affiliations and activities would constitute an invasion of his or her privacy.[28]

**Financial records** — In **Gregory v. Federal Deposit Insurance Corp.** 470 F. Supp. 1329 (D.D.C. 1979), the plaintiff requested copies of financial documents from two county banks. The court noted that Exemption 6 already had been invoked 89 times to protect such information as the identities of purchasers of banks and the financial obligations of borrowers. Said the court:

> (F)inancial information can certainly be 'similar' to medical and personnel files. . . . (F)inancial information can constitute a clearly unwarranted invasion of privacy. . . . The release of personal information such as the size of one's loan, his assets or his collateral put up for a loan would constitute a clearly unwarranted invasion of an individual's privacy.[29]

In **National Parks and Conservation Ass'n v. Kleppe**, 547 F.2d 673 (D.C. Cir. 1976), the association wanted to obtain records of the assets, liabilities and net worth of Park Service concessionaires. The court decided that such personal financial information qualified as "similar files." The information was not released.

**Criminal histories** — Several cases indicate courts will allow agencies to invoke Exemption 6 to protect criminal records. In **Serbian Eastern Orthodox Diocese for the United States and Canada v. Central Intelligence Agency**, 458 F. Supp. 798 (D.D.C. 1978), plaintiffs wanted CIA documents pertaining to the investigation of that church. Because the papers included "damaging information regarding 66 individuals alleged to have been involved in criminal activities — racketeering, bootlegging and extortion," such information would constitute a clearly unwarranted invasion of privacy when balanced against the public interest in disclosure.

In **Malizia v. Department of Justice**, 519 F. Supp. 338 (S.D.N.Y. 1981), the plaintiff, a convicted narcotics dealer, requested FBI criminal histories of third parties. The court found that "rap sheets" on third parties (lists of instances when an individual had been arrested and charged, regardless of whether conviction resulted) were "similar files" whose disclosure was unwarranted.

In **Brown v. Federal Bureau of Investigation**, 658 F.2d 71 (2d Cir. 1981), the court ruled that FBI files about a kidnapping victim were "similar files." The kidnapper had requested the information to challenge his conviction.

**Union authorization cards** — Courts consistently have held that union authorization cards signed by employees are exempt from disclosure. Such cards are collected during campaigns when employees agree to allow a union to represent them in collective bargaining. Employers have requested the cards under the FOIA on various occasions. Courts have ruled they are "similar files" whose disclosure would "chill" an employee's willingness to sign the cards. See **Committee on Masonic Homes, Etc. v. National Labor Relations Board**, 414 F. Supp. 426 (E.D. Pa. 1976), **vacated and remanded**, 556 F.2d 214 (3d Cir. 1977); **Howard Johnson Co., Inc. v. National Labor Relations Board**, 618 F.2d 1 (6th Circ. 1980); and **United Supermarkets Inc. v. National Labor Relations Board**, 449 F.Supp. 407 (N.D. Tex. 1978).

## CONCLUSION

There is little published criticism of the need for a privacy exemption to the FOIA, even among vigorous defenders of press freedom. As a practical consideration, confidentiality in private matters such as health and family affairs protects against undue public exposure, against the nakedness of the "fishbowl."

But where should the line be drawn to reach a workable compromise between privacy rights and the public's right to government information? What kind of public documents can be released without jeopardizing sensitive private facts?

For 16 years following passage of the FOIA, courts were asked to settle that clash of interests because of the ambiguous wording of Exemption 6. But when lower courts dealt with the issue, they found little guidance either from Congress or higher legal authority. The courts looked at each case to determine what information constituted a "similar file." A union card? Church membership list? Bank loan?

The single consistent standard to emerge was in the D.C. Circuit, where that court reviewed the Exemption's legislative history and decided Congress had intended to include "intimate" or "personal" records under the rubric of "similar files."

More than 10 years passed with the D.C. Circuit following that standard. The Supreme Court then swept aside that standard in **Post**. But the high court's ruling did not automatically put documents containing personal information beyond disclosure. Instead, such documents now are subject to the balancing test to determine whether their release would be a clearly unwarranted invasion of privacy.

At heart, the **Post** decision was a raising of standards. Before **Post**, a personal record ruled to be not a "similar file" was released without further ado. Addresses, passports and biographic lists were not "similar files" before **Post**. Now they are. Under **Post** there will be more such "similar files." There may be far fewer possibilities for disclosure.

It is too early to evaluate the full significance of **Post**. Through April 1983, the decision had not been cited in any key, lower court decisions. However, that may due to the declining number of Exemption 6 cases.

The Supreme Court's broadening of the term "similar files" may effectively discourage the public from taking Exemption 6 privacy cases to court, for once a record is deemed a "similar file," the chances it will survive the balancing test and be disclosed is uncertain. A review of recent Exemption 6 cases indicates the proposed release of "similar files" frequently has been judged to be a clearly unwarranted invasion of privacy.

The inclusion of so many documents under "similar files" may well result in their status remaining unchallenged. The public may accept "similar files" as deserving of secrecy, and let it go at that.

**FOOTNOTES**

1. **U.S. Department of State v. Washington Post Co.**, 456 U.S. 595, 102 S. Ct. 1957, 1958 (1982).
2. U.S.C. 552 (b) (6).
3. Barbara A. Joseph, "How Similar Is a Similar File?" **West New England Law Review**, Vol. 2, pp. 815, 824 (Spring, 1980).
4. Anthony Kronman, "The Privacy Exemption to the Freedom of Information Act," **Journal of Legal Studies**, Vol. 9, pp. 727, 739 (December 1980).
5. **Ibid.**, p. 740.
6. **Getman v. National Labor Relations Board**, 450 F.2d 670, 675 (D.C. Cir. 1971).
7. **Post**, 456 U.S. 597, 102 S.Ct. 1959.
8. **Ibid.**, 456 U.S. 598, 102 S.Ct. 1959.
9. **Joseph**, p. 832.
10. **"Two Dailies Argue Cases Before the U.S. Supreme Court," Editor & Publisher**, 10 April 1982, p. 40.
11. **Post**, 456 U.S. 600, 102 S.Ct. 1960.
12. **Ibid.**, 456 U.S. 601, 102 S.Ct. 1960, 1961.
13. **Ibid.**, 456 U.S. 602, 102 S.Ct. 1961.
14. "Similar Files: A Concept in Peril," **FOIA Update**, Vol. 2, No. 2, p. 3, (Winter 1981).
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17. **Ibid.**
18. "Passport Records Qualify for FOIA Exemption, High Court Rules," **Access Reports**, Vol. 8, No. 11, p. 3, 26 May 1982.
19. Tonda Rush, director of FOI Service Center, Washington, D.C., telephone interview, 7 April 1983.
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21. Metcalfe interview.
22. **Getman**, 670.
23. **Rural Housing Alliance v. Department of Agriculture**, 498 F.2d 73, 77 (D.C. Cir. 1974).
24. **Board of Trade, Etc. v. Commodity Futures Trading Commission**, 627 F.2d 392, 400 (D.C. Cir. 1980).
25. **Simpson v. Vance**, 648 F.2d 10, 14 (D.C. Cir. 1980).
26. **Kurzon v. Department of Health and Human Services**, 649 F.2d 65, 69 (1st Cir. 1981).
27. **Department of the Air Force v. Rose**, 425 U.S. 352, 376, 96 S.Ct. 1592, 1607 (1976).
28. **Church v. Federal Deposit Insurance Corp.**, 470 F. Supp. 1329, 1334 (D.C.D. 1979).
29. **Gregory v. Federal Deposit Insurance Corp.**, 470 F. Supp. 1329, 1334 (D.C.D. 1979).

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